Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

No. 02-110

In The Supreme Court of the United States

CHARLES E. COLLINS, III,

Petitioner,

v.

SOL GREENBERG, JAMES NIXON and CHRISTOPHER D. HORN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

MICHAEL LYNCH
Albany County Attorney

ROBERT P. ROCHE
ROCHE, CORRIGAN, MCCOY & BUSH
Counsel of Record to the County of Albany
Office & P.O. Address
36 South Pearl Street
Albany, New York 12207
(518) 436-9370

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

24pp

TABLE OF CONTENTS

		Page
STATEMENT OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI		1
STATEMENT OF THE CASE		1
ARGUMENT		4
POINT I	THE DISTRICT COURT BELOW HAD THE AUTHORITY AND PROPERLY EXERCISED IT *SUA SPONTE* TO DISMISS THE CLAIM OF CHARLES E. COLLINS, III AGAINST DEFENDANTS GREENBERG, NIXON AND HORN	4
POINT II	THE PLAINTIFF HEREIN "EFFECTIVELY WAIVED" HIS IMMUNITY WHEN HE APPEARED BEFORE THE GRAND JURY AND KNOWINGLY EXECUTED A WAIVER OF IMMUNITY WHICH ISSUE HAS BEEN ALREADY JUDICIALLY REVIEWED	8
CONCLUSION		20

TABLE OF AUTHORITIES

Page

CASES:

Barrett v. The United States, 797 F.2d 565 7

Brady v. Marks, 7 F.Supp.2d 247 8

Buckley v. Fitzsimmons, ___ U.S. ___, 113 S.Ct. 2606 ..... 6, 7, 11

Burns v. Reed, 500 U.S. 478 6

Daloia v. Rose, 849 F.2d 74 7

Dory v. Ryan, 25 F.3d 81 (2d Cir. 1994) 7, 8

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949) 7

Hills v. New York, 45 F.3d 653 (2d Cir. 1995) 7

Imbler v. Patchman, 424 U.S. 430 ..... 6, 8

Leonhard v. The United States, 633 F.2d 599 4

Lewis v. New York, 547 F.2d 45 (2d Cir. 1976) 5

Morgan v. Null, 117 F.Supp. 11 (SDNY, 1953) 15

Neitzke v. Williams, 490 U.S. 319 (1989) 6

People v. Chapman, 69 AD.2d 497 ..... 12, 13, 14

People v. Degnan, 246 AD.2d 819 (3rd Dept., 1998) 16

People v. Diaz, 211 AD.2d 402 (First Dept., 1995) 18

People v. Futia, 113 Misc.2d 651 (1982) 15

People v. Hethington, 172 Misc.2d 840 8

People v. Jorge, 172 Misc.2d 795 (1997) 17

People v. Lattanzio, 134 Misc.2d 469 (1987) 15

People v. Smith, 87 N.Y.2d 715 (1996) 16, 17

People v. Trammel, 178 Misc.2d 753 (1998) 16

TABLE OF AUTHORITIES – Continued

Page

Perez v. Ortiz, 849 F.2d 793 4

Pinaud v. Suffolk, 52 F.3d 1139 6

Powers v. Coe, 728 F.2d 97 7

Robins v. Rarebach, 325 F.2d 929 4

San Filippo v. U.S. Trust, 737 F.2d 246 7

In re Schlesinger Investment, 671 F.2d 742 5

Square D Corporation v. Niagara Frontier, 760 F.2d 1347 5

Taub v. Hale, 355 F.2d 201 4

Tenney v. Brandhoue, 341 U.S. 367 6

Thomas v. Scully, 943 F.2d 259 ..... 4, 5

STATUTES:

Code of Criminal Procedure § 190.45 ..... 9, 12

Code of Criminal Procedure §§ 190.45 and 190.50 12

Criminal Procedure Law § 190.52 18

Federal Rules of Civil Procedure § 12(e) 5

Federal Practice and Procedure § 1357 at 593 (1969) 4

2A Moore's Federal Practice § 1207(2)(5) 5

United States Code § 1983 ..... 1, 6, 7

28 U.S.C. § 1915(v) 5

28 U.S.C. § 1959(d) 5

STATEMENT OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

The decision of the Second Circuit Court of Appeals is safe and sound. The appellant's position has been repeatedly ruled untenable and/or frivolous. The legal legerdemain attempted to be spun by claimant has no legal merit as no fraction of any entitlement to due process was violated.

STATEMENT OF THE CASE

Once again Mr. Collins is suing Sol Greenberg and Assistant District Attorneys in his office for what he describes as a violation under Section 1983 of the United States Code of his Constitutional rights. He claims that under color of state law they deprived the appellant of his right to counsel, his right to due process and his right to equal protection under the law. He further argued in the court below and in his appeal to this court that none of the defendants had judicial immunity as they acted in "complete absence" of any jurisdiction which he says is by "state statute and case law." Thus such deprived them of jurisdiction. The basis of his position in that regard will be expanded in one of the following points in this memorandum.

The plaintiff, then defendant, appeared before the City Court of Albany Criminal Division at which time the well aired colloquy took place between himself and Judge Herrick. The judge had previous experience with Mr. Collins not only in previous criminal matters but also in previous legal proceedings regarding visitation, custody and Family Court matters.

At that time Mr. Collins was asked if he wanted to have the Public Defender appointed. He eschewed the representation of the Public Defender advising the court that he would represent himself as he had many times in the past. Ultimately the case was moved to the Grand Jury. He appeared before the Grand Jury in April of 1998 to testify at which time a colloquy took place which is set forth in the appendix. This constitutes the transcript of proceedings before the Grand Jury which indicates that a waiver of immunity was signed before the Foreman of the Grand Jury, the Clerk of the Grand Jury and filed with the Grand Jury. It is later found to be missing at a hearing before Judge Rosen, a hearing which resulted in the Court's decision set forth at pages 111-119 of the Appendix, Mr. Collins, now claimant, testified before the Grand Jury asking them to indict him. The Grand Jury accommodated the plaintiff by indicting him. Now he is claiming before this Court that because he claims he was entitled to transactional immunity the District Attorney was devoid of any jurisdiction to prosecute him and using that fulcrum of false argument seeks to have his conviction overturned at the same time prospering a lawsuit for damages against the County of Albany, the District Attorney and the assistants in his employ.

When this case was filed initially Judge Thomas McAvoy, Federal District Court Judge *sua sponte* dismissed the complaint of the plaintiff on the basis that it was barred by the absolute prosecutorial immunity enjoyed by the District Attorney and his employees since it was functional immunity defined by the Federal District Courts and the United States Supreme Court. In keeping with the present status of the law Judge McAvoy granted to the claimant a period of 30 days from the filing of the

order dismissing his complaint to allow the service of an amended complaint which might allege wrongful conduct against a defendant or defendants who were not immune from suit. As part of that decision and order claimant was ordered to file an amended complaint, if at all, "within 30 days" of the filing date of that order listing there individuals who were not immune from suit and setting forth a claim or cause of action against them on which Federal relief may be granted by that court.

Mr. Collins chose not to do so but chose instead to appeal. Since the defendants had not been put on notice of the *sua sponte* decision dated September 23, 2000 they moved instead of answering for Summary Judgment on several grounds. That motion the judge ordered stayed due to the fact that in the interim Mr. Collins further compounded the matter by filing a notice of appeal from Judge McAvoy's *sua sponte* decision rather than complying with the judge's order to file an amended complaint.

The Second Circuit Court of Appeals dismissed the appeal because there was a matter pending before the District Court which resulted in a second order of Judge McAvoy dated April 7, 2001 rendering the Summary Judgment motion by the defendants as moot, once again dismissing the plaintiff's complaint for failure to follow the prior order of the court and as such dismissing it because as the court below said "There is currently no complaint pending in the instant action. Accordingly, plaintiff's case must be dismissed and defendants motion for Summary Judgment denied as moot."

ARGUMENT

POINT I

THE DISTRICT COURT BELOW HAD THE AUTHORITY AND PROPERLY EXERCISED IT *SUA SPONTE* TO DISMISS THE CLAIM OF CHARLES E. COLLINS, III AGAINST DEFENDANTS GREENBERG, NIXON AND HORN.

THE *sua sponte* AUTHORITY OF THE COURT

The leading case regarding the District Court's ability to dismiss *sua sponte* a case filed with the Clerk of the Court is *Leonhard v. The United States*, 633 F.2d 599, see note at 609, [note 11] (2d Cir. 1980), *cert. denied*, 451 U.S. 908. That case affirmed the long held position that a District Court had the inherent power to dismiss an improperly filed or inadequately stated claim as long as the District Court in doing so afforded to the claimant notice and an opportunity to be heard. *Thomas v. Scully*, 943 F.2d 259 and *Perez v. Ortiz*, 849 F.2d 793.

Leonhard stands for the proposition that the District Court has the power to dismiss a complaint *sua sponte* for failure to state a cause of action or to establish a cause of action for which the Federal Court can grant relief. (Citing *Robins v. Rarebach*, 325 F.2d 929 (2d Cir. 1963), *cert. denied*, 379 U.S. 974; C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 593 (1969); *Taub v. Hale*, 355 F.2d 201 (2d Cir. 1966).

The case of *Perez v. Ortiz* cited above has an interesting discussion on the issue of motions *sua sponte* in it and cites several principal authorities which are also in support of the defendants position in this matter. (*Perez v.*

Ortiz, 849 F.2d 793 at 797) The *Perez* case cites the Federal Rules of Civil Procedure § 12(e) which grant the inherent power to the Court to overview complaints filed with it as well as the specific provisions of 28 U.S.C. § 1915(v) which refers to 2A Moore's Federal Practice § 1207(2)(5). These cases and authorities support the general position found in *Leonhard* that as long as the claimant is given "an opportunity" to be heard under such parameters as the Court deems fair and just, dismissal *sua sponte* is an appropriate oversight to be exercised by the District Courts. *Square D Corporation v. Niagara Frontier*, 760 F.2d 1347 (2d Cir. 1985); *Lewis v. New York*, 547 F.2d 45-46 (note 4) (2d Cir. 1976), *aff'd*, 476 U.S. 409. The Courts have thus held that as long as there is an opportunity to the claimant to be heard after the oversight by the District Court is exercised there is no deprivation of due process. *In re Schlesinger Investment*, 671 F.2d at 742. Such an opportunity was afforded Collins.

In another vein is the case of *Thomas v. Scully*, 943 F.2d 259 which references § 1959(d) of 28 U.S.C. affirming the statutory scheme that the inherent power in the District Court is codified to allow oversight exercised by the Court as long as the procedure employed is "fair". Fair has later been interpreted to mean "as long as the claimant has an opportunity to be heard" in whatever the Court deems is an appropriate forum and afforded as much time as necessary to effect that fair hearing.

If the Court finds that any pleading is inadequate on its face it is no longer necessary that the pleading be deemed "frivolous" in order to justify its dismissal under 1915(v). Thus a District Court may exercise its oversight to determine that, based on the facts as stated in the complaint and given their most fair reading, the case

cannot result in a verdict for the plaintiff, i.e., there is no Federal relief to be granted, the case is an appropriate case for the District Court to exercise its discretion and oversight and dismiss *sua sponte*. *Neitzke v. Williams*, 490 U.S. 319 (1989).

THE ABSOLUTE IMMUNITY OF THE PROSECUTORS

The Court below in its initial decision dismissing the case *sua sponte* cited the case of *Pinaud v. Suffolk*, 52 F.3d 1139 (2d Cir. 1995) at page 147 et seq. That case, among other things, says specifically "Congress did not intend § 1983 to abrogate immunities well grounded in history and reason." citing *Buckley v. Fitzsimmons* and *Tenney v. Brandhoue*, 341 U.S. 367. The Court specifically held there,

> "The doctrine of absolute prosecutorial immunity creates a formidable obstacle for a plaintiff seeking to maintain a civil rights action against a District Attorney, as it provides that 'prosecutors are absolutely immune from liability under § 1983 for their conduct in initiating a prosecution and presenting the State's case' in so far as that conduct is intimately associated with the judicial phase of the criminal process." Citing *Burns v. Reed*, 500 U.S. 478 at 486 (1991) further quoting *Imbler v. Patchman*, 424 U.S. at 430/31.

The Second Circuit Court of Appeals in *Pinaud* held that " . . . to preserve the integrity of the judicial process and to enable zealous performance of prosecutorial duties without the constant threat of legal reprisals" the court will support absolute immunity for prosecutors as long as

the prosecutorial action which is performed is in the "functional" aspect of the prosecutor's duties. *Hills v. New York*, 45 F.3d 653 at 656 (2d Cir. 1995); *Gregoire v. Biddle*, 177 F.2d 579 at 581 (2d Cir. 1949) (Learned Hand, Justice); *Powers v. Coe*, 728 F.2d 97 (2d Cir. 1984) a case which describes the "functional" approach to the immunity question.

Another principal case in this chain and line of successive cases is *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994) where the Federal District Court and the Second Circuit Court of Appeals affirmed that a prosecutor enjoys absolute immunity in Section 1983 cases even when it is alleged that he "conspired to convict the defendant" and even if it is alleged to be based on perjured testimony. His absolute immunity extends to all actions "relating to advocacy", although the court did find in affirming the decision in *San Filippo v. U.S. Trust*, 737 F.2d 246 (2d Cir. 1984) that prosecutorial immunity does not extend to all actions that are extrajudicial acts and therefore not covered in his prosecutorial duties. Such is not Collins' claim here.

A pivotal case before the United States Supreme Court was *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606 (1993) which was the first case of note to apply the "functional" approach to prosecutorial immunity. It was in that case that the court there formulated the language that ultimately became the benchmark of prosecutorial immunity in a functional approach as " . . . intimately associated with the judicial phase of the criminal process."

The Second Circuit has held both in *Barrett v. The United States*, 797 F.2d 565 (2d Cir. 1986) and *Daloia v. Rose*, 849 F.2d 74 (2d Cir. 1988) that immunity attaches to

the prosecutor's function not to the manner in which he performs the function. Hence, in this case the function of prosecuting the claimant, then defendant, would be a protected activity.

Brady v. Marks, 7 F.Supp.2d 247 was a case which also dealt with prosecutorial immunity whose reasoning is found repeated in the *Dory v. Ryan* case (cit. supra) where the court held " . . . we recognize that there is a greater societal goal in protecting the judicial process by preventing perpetual suits against prosecutors for the performance of their duties." *Imbler v. Patchman*, 424 U.S. 409 (note 32) (1976) at pages 426-428.

Therefore it is paramountly clear that the District Court had more than ample reason on the face of the pleading to exercise its discretion and *sua sponte* to dismiss the case at hand as it is covered with absolute prosecutorial immunity.

POINT II

THE PLAINTIFF HEREIN "EFFECTIVELY WAIVED" HIS IMMUNITY WHEN HE APPEARED BEFORE THE GRAND JURY AND KNOWINGLY EXECUTED A WAIVER OF IMMUNITY WHICH ISSUE HAS BEEN ALREADY JUDICIALLY REVIEWED.

Judge Larry Rosen whose total decision and order appears in the appendix to the plaintiff's brief at pages A111-119 sums up one judicial view of the evidence, the testimony and the parsing engaged in by the plaintiff in the following quotation, " . . . the quintessential elevation of form over substance to hold that the defendant did not waive immunity under these circumstances." Citing *People v. Hethington*, 172 Misc.2d 840.

The appellant puts great emphasis on § 190.45 of the Code of Criminal Procedure dealing with Grand Jury waiver of immunity. That section essentially holds 1) that the waiver must be written and subscribed by the witness and 2) that it must be sworn to in the presence of the Grand Jury, i.e., before the Grand Jury. Beginning at page A52 of the appendix to the appellant's brief the dialogue and the transactions which occurred before the Grand Jury show clearly the following facts:

The appellant identified himself as a paralegal. Not as he sometimes quotes a part-time paralegal but as a paralegal.

He was asked the following question, " . . . [have you] decided to proceed here pro se as your attorney," "Correct?" Answer: "That's correct".

The record shows that the plaintiff was advised of his right to counsel when asked about his knowledge of and his entitlement to counsel he was asked if he knew he had the right to counsel at this proceeding and it at all proceedings to which he responded, "That's correct."

When he was reminded of the two charges that were filed against him so that there can be no question that he knew what he was facing he answered, "That's correct, two charges."

When inquired of him as to whether he chose to act as his own attorney and whether he still wished to testify, acting as his own attorney he said, "That's correct."

Following the above events he was asked to execute a document entitled "Waiver" and asked if he was familiar with what it means to waive immunity to which he answered "Yes I am."

He was further asked whether he knew that by signing such a document he would give up certain legal rights and he said again "That's correct."

He was also asked if he had a prior opportunity to review the document, [that is the waiver], and whether it had been given to him in advance of his appearance before the Grand Jury so that he could review the same and analyze the same and he advised "That's correct."

Again asked if he had time to review it he answered, "Yes, I have."

He was then specifically asked, "Do you specifically give up immunity from prosecution in exchange for the right to testify here?" to which he said "That's correct."

He was then admonished that any statement he gave *will definitely* be used against him in this or any other proceeding, questioned as to his acknowledgment of that knowledge to which he responded "That's correct."

Following that colloquy he was then urged to take additional time and after having done so he executed the waiver of immunity. The Foreman of the Grand Jury signed the document as a witness thereto and the official Grand Jury stenographer who was a notary public took the witness' acknowledgment.

It was on that basis that Judge Rosen (A111-119) found that he had effectively waived his immunity stating that it would have been the quintessential elevation of "form over substance" to have held that he did not in fact effectively waive.

What the claimant here is attempting to say is that at a later time after that colloquy took place establishing all

of the aforesaid elements of the waiver, that the original waiver cannot be found. If in fact through error Mr. Collins picked up and walked out of that Grand Jury room with that waiver, we have now elevated sleight of hand to sleight of reasoning, however unintentional.

Following that colloquy Mr. Collins testified before the Grand Jury and admitted that he committed the acts which formed the factual basis of the criminal complaint and that such acts were done by him at the time and the place set forth in the charges because of circumstances which he felt formed his "unique right" to protest the judicial system and that by exercising his right of free speech in that manner the same could not constitute the commission of a crime.

The case at bar is not a new lawsuit in this court as this claim was substantially submitted previously and voluntarily withdrawn when Mr. Collins was noticed to appear for an examination before trial to be placed under oath. This conduct by Mr. Collins presents to this court a clear abuse of the judicial process and the very thing which the Supreme Court sought to avoid the "endless chain" of litigation against prosecutors for the clear and simple reason of doing their jobs. *Buckley v. Fitzsimmons* (cit. supra)

This unsophisticated shell game which Mr. Collins is exercising is a manipulation of the judicial system involving the expenditure of taxpayer's funds to defend repeated and frivolous litigation to further foster his newfound hobby, to harass the judicial system.

He brought an action in the County Court of Albany County to seek a writ of prohibition prohibiting the District Attorney from proceeding further against him before

he went to trial in this case. He brought it on the same basis that the alleged violation of § 190.45 and 190.50 of the Code of Criminal Procedure barred the defendants herein from prosecuting him as a matter of law. Later the Appellate Division Third Department, Supreme Court of the State of New York unanimously held in reviewing Judge Rosen's decision that not only was the writ of prohibition an inappropriate vehicle for the relief that the claimant sought but approvingly cited Judge Herrick's judicial inquiry at the initial time of arraignment. This inquiry by Herrick is however, criticized by Mr. Collins as inappropriate and falling far short of the "judicial standard."

One of Mr. Collins' complaints is he was denied effectively the right of counsel and that he *could not* waive the right of counsel although in each of the six prior litigations commenced in either the Supreme Court of the State of New York or in Federal District Court Mr. Collins pursued each and every one of these cases pro se. They have all ended either in a court order dismissing his case or his voluntary discontinuance and withdrawal of the claims. Judge Rosen cited in his decision [cited previously] that the court's judicial inquiry as to whether or not the willingness to proceed pro se was intelligent, knowing and appropriate noted with approval the meticulous, accurate and well constructed pro se brief and pro se motion papers filed by Mr. Collins and the underlying prohibition motion before the County Court in May of 1998. All of these judgments were inherently affirmed by the Appellate Division in reviewing the decision of Judge Rosen.

The appellant relies heavily on *People v. Chapman*, 69 AD.2d 497 which is a rather singular case. The tortured lengths to which Mr. Collins would extend the holding in

Chapman would make it impossible, not virtually impossible but factually impossible, ever to have a defendant waive their right to independent counsel not merely "counsel", even though that person may be appearing for himself before a Grand Jury, Petit Jury or a Court. In Mr. Collins' interpretation of the *Chapman* case he has adopted a position similar to that of a person who murders his mother and father and throws himself on the mercy of the court because he is now an orphan. The facts in *Chapman* bear some review. In the *Chapman* case defendant was represented at arraignment by retained counsel. At the time of his appearance before the Grand Jury it was his attorney's decision not to appear at the Grand Jury and not to have Mr. Chapman testify. However, despite his counsel's advice Mr. Chapman appeared at the Grand Jury stating that he wanted the opportunity to "explain" a few things to the Grand Jury in the expectation that he would not be indicted.

He did not have his personal retained counsel present and after a somewhat shallow inquiry by the court as to whether or not he was aware that waiving immunity and testifying before the Grand Jury was a "very serious matter" the defendant Chapman then proceeded to testify and not surprisingly was indicted. That is hardly the case at bar. Prior to appearing before the Grand Jury Mr. Chapman had been represented by an attorney and counsellor at law who had been retained by him to protect his interests. Throughout the many year history of Mr. Collins' involvement with the law before the City Court Criminal Division in Albany, the County Court and other courts including the Supreme Court of New York State and the Federal District Court Mr. Collins nearly always appeared for himself, apparently because he is the only

attorney he truly trusts. In the *Chapman* case there was no evidence that Chapman ever appeared pro se before *any* court or that he had *any* familiarity with the court system whatsoever. There certainly was no evidence in the *Chapman* case that Chapman was a paralegal. Mr. Collins identified himself before the Grand Jury as a paralegal. Judge Herrick was well aware of Mr. Collins' abilities to represent himself as he had experience with him in a 1995 case which was in Judge Herrick's court involving an act of civil disobedience at the mall complex of state offices in Albany. The arraigning judge in that case was, according to the record, Stephen Herrick and throughout that matter Collins appeared for himself, appeared at a suppression hearing and later at a trial at which time he tried the case in defense of himself resulting in the charges against him being dismissed by Judge E. David Duncan, an associate judge in the criminal division in the City Court of Albany. Mr. Collins' reputation in the City Court Criminal Division was well known and his ability was also recognized to be well known as well. On the record, which Mr. Collins likes to quote, Judge Duncan praised Mr. Collins' pro se work, his talent as a legal advocate and encouraged his continuance of the same.

The courts of this state have universally recognized that where the representation is knowing and intelligent and that the defendant understands what he is undertaking the courts always allow a defendant in a criminal matter to represent himself. Albeit, sometimes they do require that they sit with counsel if there's any doubt in the judge's mind as to whether or not the party appearing before him knows what he is doing or not, but there was no such doubt in Judge Herrick's mind, nor in Judge Rosen's mind nor in any other judge's mind in this area

where they were well acquainted with Mr. Collins and his pro se representations.

After his arraignment in City Court in Albany he was notified, as his own attorney at his Troy address, of all further proceedings and the appearance and the opportunity to testify before the Grand Jury. Mr. Collins did not appear before the Grand Jury without the benefit of counsel. He appeared with the only counsel he trusted over the past 10 years, himself. To read the transcript of Mr. Collins' appearance as is set forth in the appendix before the Grand Jury and to allow this defendant, now claimant, the benefit of hoodwinking the judicial system would be a disgrace. Indeed Mr. Collins had the right to testify before the Grand Jury, a right which the Grand Jury and the District Attorney's office acknowledged after he signed the requisite waiver of immunity. That right is guaranteed to a defendant and Mr. Collins knowing that it was guaranteed to him, took advantage of it. See *Morgan v. Null*, 117 F.Supp. 11 (SDNY, 1953).

It is impossible to imagine that Mr. Collins, when he appeared before the Grand Jury in the dialogue attached to his complaint and set forth in his motion papers could have done more to sustain the burden on him to prove that he was knowingly and intelligently proceeding pro se. Having done so on previous occasions and having satisfied the requirements of other judges, he then *had* to be given the right to testify with the advice of himself as counsel. See *People v. Lattanzio*, 134 Misc.2d 469 (1987) and *People v. Futia*, 113 Misc.2d 651 (1982).

Although the prosecutor limited Mr. Collins in the scope of his testimony so that he could not use the Grand Jury as a bully pulpit from which to make a declaration in

accordance with the principals in *People v. Smith*, 87 N.Y.2d 715 (1996) he certainly had the free and open opportunity to testify and explain whatever he wanted to about his conduct and then invite the Grand Jury to indict him – which they did. Having sustained by a reasonable dialogue his ability, knowledge, understanding and knowing intent to waive his immunity and pursue his right to testify before the Grand Jury, Mr. Collins is ill begotten to come here now and claim that the piece of paper, the waiver of immunity which was acknowledged to be executed by him in the presence of the Clerk of the Grand Jury and the Foreman of the Grand Jury, although now missing, was not [according to the statute] "filed" with the Grand Jury. Such is an absolute relegation of substance to form. See *People v. Degnan*, 246 AD.2d 819 (3rd Dept., 1998) and *People v. Trammel*, 178 Misc.2d 753 (1998).

There can be no suggestion that the conduct of the District Attorney's office and the prosecutorial staff before the Grand Jury was a departure from anything which preceded in this case or in the many prior involvements of Mr. Collins with the criminal justice system. The defendant then, now claimant, had proceeded pro se consistently and had been supported in that by both Judge Duncan and Judge Herrick along with the general acknowledgment of the local judiciary that Mr. Collins appeared pro se. He satisfied both the arraigning court and the adjourning court that he was capable and competent to represent himself and had done so to his own acquittal in the past. Had the District Attorney interfered with his right and denied him the right to testify before the Grand Jury it would be the District Attorney who might have violated Mr. Collins' statutory rights to testify before the Grand Jury and that would be the substance of

his appeal to this court and not the one he is currently pursuing.

This court should note the seriousness and the patience with which Mr. Horn interrogated Mr. Collins warning him of the serious consequences of the waiver and asking him repeatedly if he understood what the waiver meant and that he could be indicted on his own testimony. Mr. Collins not only asked to testify, he begged to be indicted so that somewhere he would have his bully pulpit from which to preach his diatribe against the judicial system of the State of New York. To have turned him away from the Grand Jury under the prior experience and the dialogue which is in the record here would have violated all the standing principals of the right of a defendant to testify before the Grand Jury. See *People v. Smith*, 87 NY.2d 715 (1996).

In a recent case of *People v. Jorge*, 172 Misc.2d 795 (1997) the court there held that when a defendant signs a waiver of immunity from prosecution in derogation of his Fifth Amendment constitutional rights he *must* be permitted to testify before the Grand Jury. There is no evidence that the waiver that was signed by him was either involuntary or induced by any improper means that was exercised over the person of the defendant. Indeed there is no such evidence in the Collins case and the *Jorge* case supports the position of the respondent herein. From the time of his arraignment to the time of his appearance before the Grand Jury Mr. Collins had more than ample time, if he chose, to obtain independent counsel or outside counsel either to represent him or to assist him in this matter. He chose not to for the reasons he stated before the Grand Jury. But now he seeks to have the Grand Jury

proceedings invalidated on what is at best, a gross technicality. Nor, in a reading of the dialogue between Mr. Collins, the D.A. and the Grand Jury is there any indication that at anytime during his proceedings and testimony before the Grand Jury he had any second thoughts about proceeding without counsel. According to Criminal Procedure Law Section 190.52 a section which I am certain Mr. Collins knows better than most practicing attorneys, he had the right to have an attorney present with him as long as the attorney did not interrupt or interfere with the proceedings of the Grand Jury. Mr. Collins at no time suggested that he have one at which time the Grand Jury proceedings would have been suspended for him to avail himself of that opportunity.

The suggestion now that he proceeded at his own peril and thereby vested upon himself transactional immunity having declared before the Grand Jury that he intentionally committed the facts and events upon which the crime is based is a total absurdity. *People v. Diaz*, 211 AD.2d 402 (First Dept., 1995), *appeal denied*, 84 N.Y.2d 972. In the case at bar the object of the investigation *was* the claimant Charles Collins and upon insisting on his right to represent himself and proceed forth to testify before the Grand Jury he had only done before the Grand Jury what he repeatedly had done in the past, time and time again, in various courts throughout this area. It might be noted by this Court that he has appeared before the District Court and before this Court pro se constructing a reasonably formidable set of papers from his experience as a paralegal which obviously he does in each and every instance in which he appears for himself.

For all of the above reasons it appears abundantly clear that the claimant Mr. Collins is once again attempting to manipulate the criminal justice system and/or the Code of Criminal Procedure to place himself in the enviable position of being able to testify with impunity having executed a waiver of immunity. He practically stood on his head to convince the system examining his conduct that he was knowingly, intelligently and capably waiving his right to independent counsel and his right to waive his immunity to testify before the Grand Jury. It is also respectfully submitted that the Court had a reasonable judicial inquiry when he was arraigned before Judge Herrick the day of his incident with the Court of Appeals on January 26, 1998.

This issue of transactional immunity has been submitted to the State Court both in County Court and obliquely by the affirmation of the County Court decision by the Appellate Division. That cleared the way for the trial to go forward in December of 2000 resulting in Collins' conviction. During all those times and with the exception of his advisory counsel at the time of trial [Mr. Lewis B. Oliver] he has represented himself pro se with full knowledge of all the proceedings he was engaged in, the nature and the extent of those proceedings and the legal consequences thereof.

CONCLUSION

THE DISTRICT AND CIRCUIT COURTS CORRECTLY APPLIED THE LAW IN THIS CASE. THE BLIND EYED ADHERENCE BY APPELLANT TO PARSING OF LANGUAGE HAS BEEN AND SHOULD CONTINUE TO BE REJECTED. TO DO OTHERWISE WOULD BE AS JUDGE LARRY ROSEN SAID: "ELEVATE FORM OVER SUBSTANCE." THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Dated: August 21, 2002

MICHAEL LYNCH
Albany County Attorney

ROBERT P. ROCHE
ROCHE, CORRIGAN, MCCOY & BUSH
Counsel of Record to the
County of Albany
Office & P.O. Address
36 South Pearl Street
Albany, New York 12207
(518)436-9370